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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 468

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

CALUMET NATIONAL BANK OF HAMMOND, SUBSTITUTED TRUSTEE UNDER THE TESTAMENTARY TRUST OF HERBERT M. PASZOTTA, DECEASED, KLARA HUHN, AND WANDA PUPPEL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statement	2
Argument	5
Conclusion	10

CITATIONS.

Braier's Estate, In Re, 111 N. E. 2nd 424	9
Brown v. J. P. Morgan & Co., 31 NYS 2nd 815	6
Brownell v. Edmunds, 110 Fed. Supp. 828	9
Clark v. Allen, 331 U. S. 503	7
Clark v. Edmunds, 73 Fed. Supp. 390	8
Drewry v. Onassis, 39 NYS 2nd 688	6
Gregg's Estate, In Re, 266 Pa. 189, 109 A. 777	6
Guessefeldt v. McGrath, 342 U. S. 308, 96 L. Ed. 342	4, 6, 9, 10
Harvard Trust Co. v. Attorney General, 329 Mass. 79, 106 N. E. 2nd 269	9
Hirabayashi v. United States, 320 U. S. 81	7
Keppleman v. Keppleman, N. J. Ch., 103 A. 27	4, 6, 8
Kielsmark's Will, In Re, 177 N. W. 690	6, 8
Klein v. Palmer, 18 Fed. 2nd 932	8
Manila Motors v. Ivaran, 46 Fed. Supp. 394	6
Matheson v. Hicks, 10 Fed. 2nd 872	8
Pipe v. LaSalle, 49 Fed. Supp. 662	6

Rahn's Estate, In Re, 291 S. W. 120, 51 A. L. R. 877.. 6
Southerland v. Guarantee Trust Co., 11 Fed. 2nd 696 8
Sutherland, In Re, 23 Fed. 2nd 595..... 8
Thramm's Estate, In Re (Cal.), 183 Pac. 2nd 97.... 9

MISCELLANEOUS.

Presidents Proclamation No. 2714, December 31st, 1946, 12 Fed. Reg. 1, 50 U. S. C. A. App. Sec. 601 note 4

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OPINIONS BELOW.

The opinion of the Appellate Court of Indiana (Appendix A of Petition) is reported at 149 N. E. 2nd 214.

JURISDICTION.

The jurisdiction requisites are adequately set forth in the petition.

QUESTION PRESENTED.

The question that is presented herein is incorrectly stated in petitioners' brief. Petitioners seem to feel that the reason the trial court below refused to enforce the vesting order was because it was of negligible importance

to the United States (Attorney General) while of great importance to the heirs. The amount in controversy is $6,178.68. (See Opinion of Appellate Court of Indiana—Appendix A, Petitioners' Brief.)

The real question is "whether or not the vesting order of the Alien Property Custodian is subject to review by the courts."

STATEMENT.

Herbert M. Paszotta was killed on November 11th, 1943 in Italy while he was in the service of the United States Army. He left a Will leaving his entire estate to Helen Fisher, a citizen and resident of the United States, IN TRUST, for the use and benefit of two sisters, who at that time were presumed to have resided in Berlin, Germany. (One of the sisters now resides in the United States.)

Payment was contingent upon two conditions, namely:

(a) the cessation of hostilities between the United States and Germany, and

(b) that the sisters survive the war.

The will further provided that in the event the sisters failed to survive, Helen Fisher was to receive the entire estate. The pertinent portion of the will (as is set forth in the Opinion of the Appellate Court of Indiana), is as follows:

> "Third: I hereby give, bequeath, and devise, absolutely and forever, all the rest, residue and remainder of my property real, personal, or of whatever nature and wherever situated of which I may die possessed or of which I may have the power of disposition, to the aforesaid Mrs. Helen Fisher, but IN TRUST nevertheless for the following trust purposes:
>
> a. To receive, hold and administer all of my said estate and property for the sole benefit of KLARA HUHN and WANDA PUPPEL both of Berlin, Germany, during

the natural lives of said Klara Huhn and Wanda Puppel or until the termination of hostilities now in existence between the United States of America and the Nation of Germany, if said termination of hostilities occur before the deaths of Klara Huhn and Wanda Puppel.

b. To manage and conduct the affairs relating to said property so that during the continuation of the aforesaid state of hostilities any and all proceeds resulting from the conduct of the property are held in safekeeping for the benefit of the aforesaid Klara Huhn and Wanda Puppel.

c. To pay over, convey, and transfer absolutely in fee simple to Klara Huhn and Wanda Puppel, the entire principal of this trust upon the cessation of the aforesaid state of hostilities and then there to terminate the trust herein imposed, and should the deaths of Klara Huhn and Wanda Puppel occur before the aforesaid cessation of hostilities and before the resumption of normal commercial and political relations between the United States of America and the Nation of Germany, then I direct that this trust is to cease and terminate, and the principal and all accumulated proceeds conveyed, transfered or paid over to said Helen Fisher, absolutely and in fee simple."

Following his death, an estate was opened in the Lake Superior Court at Hammond, Indiana, (which was his residence prior to his induction into the armed forces) on March 15th, 1944. The estate was fully administered and closed on March 13th, 1945, and the net proceeds of the estate ($6,178.68) turned over to Helen Fisher, Trustee. (Helen Fisher died during these proceedings, and the Calumet National Bank of Hammond was named Successor Trustee.)

The vesting order which petitioners complained was denied enforcement, was filed on November 8th, 1950 (Vesting Order No. 15163), more than 5½ years after the

estate was closed; more than five years after the war between the United States and Germany ended, and almost 4 years after the President of the United States officially proclaimed the cessation of hostilities to be effective. (President's Proclamation No. 2714, December 31st, 1946, 12 Fed. Reg. 1, 50 U. S. C. A. App. Sec. 601 note.)

When the Alien Property Custodian filed his vesting order, the trustee filed a petition for instructions as to whom the money on hand should be paid, namely, the heirs or the Alien Property Custodian.

The trial court determined that the money should be paid to the heirs, and the Appellate Court of Indiana affirmed this judgment.

The court held that "The powers of the Attorney General to seize property by virtue of the Trading with the Enemy Act should be exercised only if a failure to seize it will result in a detriment to the United States and never if seizing it will result only in injury to an individual owner and be without benefit to the United States. (*Keppleman* v. *Keppleman* (1918) N. J. Ch. 103 A. 27. See also *Guessefeldt* v. *McGrath* (1952) 342 U. S. 308, 96 L. Ed. 342) * * *"

The question presented, therefore, is not the simple refusal of the Indiana Courts to enforce a vesting order because of its "negligible importance," but rather taking all of the facts and occurrences into consideration, should the courts recognize and enforce a vesting order that results in no benefit to the United States, but in effect simply amounts to a confiscation of an owner's property.

Another view of the question presented is, "How long after the war may the Alien Property Custodian seize property alleged belonging to an enemy alien." Is it 5, 10 or 20 years?

ARGUMENT.

The opinion of the Appellate Court of Indiana was in some respects a response to two of the propositions urged by the Alien Property Custodian. Those arguments were:

> (a) an important purpose of the Trading with the Enemy Act was to make assets available in defraying the costs of war. (Vesting was a phase of a plan to solve the reparation problem left by World War II.)
>
> (b) whether or not the discretion regarding the seizure of enemy property has been soundly exercised is not subject to court review.

The argument that the petitioners urged in the Appellate Court of Indiana to the effect that it was a primary purpose of the Trading with the Enemy Act to seize property for the purpose of making assets to pay reparations was rejected by the Appellate Court, so far as it applied to this case. The court held as follows:

> "As far as the present record discloses the value of the property seized was $6,178.68 and as revenue for the payment of claims growing out of World War II, such a sum of money is of negligible importance.
>
> That it was not urgently needed nor of any estimable benefit to the United States is indicated by the fact that the war with Germany had been over four years before the Attorney General issued the vesting order in question. It is true that the vesting order recites that seizure is 'deemed necessary in the national interests' but surely that bold statement does not make it so nor does it foreclose a court from reviewing the order for abuse of discretion in its issuance * * *." (See opinion of Appellate Court—page 21, Petitioner's Brief.)

It has always been the law in this country that the purpose of the Trading with the Enemy Act was to prevent property belonging to enemy nationals from falling into enemy hands and to prevent the lending of aid and comfort to the enemy. (*In Re Rahns Estate*, 291 S. W. 120, 51 A. L. R. 877; *In Re Kielsmark's Will*, 177 N. W. 690; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 96 L. Ed. 342.)

The purpose of the act was to prevent American money from falling into enemy hands and to prevent the lending of aid and comfort to the enemy by frustrating the enemy's attempt to garner sinews of war. (*Manila Motors* v. *Ivaran*, D. C.-N. Y., 46 Fed. Supp. 394; *Pipe* v. *LaSalle*, D. C.-N. Y., 49 Fed. Supp. 662.)

The act was not for the purpose of the confiscation of property of private individuals. (*In Re Greggs Estate*, 266 Pa. 189, 109 Atl. 777.) Its purpose was to prohibit and prevent the lending of aid to the enemy. Confiscation is not the objective. (*Drewry* v. *Onassis*, 39 N. Y. S. 2nd 688.)

The purpose was to prevent the possession, utilization and disposition of assets and property in this country belonging to enemy nationals by such hostile powers; but it was not its purpose to interrupt the normal administration of justice. (*Brown* v. *J. P. Morgan & Co.*, 31 N. Y. S. 2nd 815.)

The purpose of the Trading with the Enemy Act must be construed in light of the purposes, first, to prevent an act resulting in detriment to the United States in war, and second, not to permit or compel an act resulting in injury to an individual alien without benefit to the United States. (*Keppleman* v. *Keppleman*, N. J. Ch., 103 A. 27.)

The ruling of the Appellate Court of Indiana in this case is in accord with these principles. The court held:

"* * * We find absolutely nothing in this record jus-

tifying the Attorney General's assertion that the seizure of $6,178.68 belonging to the appellees Huhn and Puppel, and to them a considerable amount, no doubt, is 'necessary in the national interests.' Such finding was apparently made in *ex parte* proceedings, and it seems to us that when private property is seized without compensation to the owner between the time of the actual cessation of hostilities and when Congress by joint resolution, formally proclaims the end of the war, the record should show some justification for the action aside from the self-serving declaration of the seizing officer * * *"

So that the purpose assigned by the Attorney General that one of the reasons for the seizure of this property is to pay war claims, or to make assets for war reparations, was rejected by the Appellate Court of Indiana, and will also, we hope, be declined by this court.

The second argument assigned by the Petitioners is that the discretion of the Attorney General in seizing property belonging to an enemy national, is never subject to review by any court.

The Appellate Court of Indiana observed that:

"It has been held that the determination of whether or not an alien enemy's property in this country shall be seized by virtue of the Trading with the Enemy Act lies within the sound discretion of the Attorney General (*Clark* v. *Allen*, 331 U. S. 503), and ordinarily the wisdow of its exercise will not be reviewed by the courts. (*Hirabayashi* v. *United States*, 320 U. S. 81.) However, we have found no decision specifically holding that the Attorney General can do no wrong in determining such matters and therefore his findings and decisions cannot be reviewed by the courts.

The decisions are legion that matters resting in the discretion of the trial court can be reviewed from an abuse in the exercise thereof. We can think of no valid reason why the Attorney General of the United States should be beyond that universally recognized principle of the law * * *"

There have been many other decisions holding that the acts of the Alien Property Custodian are subject to review by the courts.

In *Keppleman* v. *Keppleman*, 103 A. 27, the New Jersey court denied the right of the Alien Property Custodian to take property willed to three German nationals prior to the entry of a final decree in the state court. The effect of this ruling was that the filing of a vesting order by the Alien Property Custodian in and of itself was of no immediate consequence.

In *Re Kielsmark's Will*, 177 N. W. 690, the Iowa court held that a devise to an enemy alien is not void under the Trading with the Eenemy Act, and that notwithstanding the vesting order, the property would be held by the executor until the termination of the war.

In *Klein* v. *Palmer*, 18 Fed. 2nd 932, the court denied relief in equity for a recovery of the property because the vesting order came after the termination of hostilities.

In *Southerland* v. *Guarantee Trust Co.*, 11 Fed. 2nd 696, the court held that the Alien Property Custodian was not entitled to recover a bank deposit held to the credit of a former enemy alien but not reported through an honest error until after the resolution declaring the end of the war.

In *Matheson* v. *Hicks*, 10 Fed. 2nd 872, a demand for property by the Alien Property Custodian served after termination of the war, was held by the court, to be ineffective.

In *Re Sutherland*, 23 Fed. 2nd 595, the court held that the Alien Property Custodian's right to seize enemy acquired property ceased on the declaration of peace.

In *Clark* v. *Edmunds*, 73 Fed. Supp. 390, the court refused to enforce a vesting order for the reason that it was premature.

In *Brownell* v. *Edmunds*, 110 Fed. Supp. 828, the court denied a motion for summary judgment (to enforce a vesting order) for the reason that the war had terminated.

In *Harvard Trust Co.* v. *Attorney General*, 329 Mass. 79, 106 N. E. 2nd 269, the court construed the provisions of a trust to the effect that it would entitle the heirs at law to make a recovery rather than the Alien Property Custodian.

In *Re Thramm's Estate* (Cal.), 183 Pac. 2nd 97, the court held that the bequests should go to American nationals and not to the Alien Property Custodian.

And, finally, in *Guessefeldt* v. *McGrath*, 342 U. S. 308, 96 L. Ed. 342, this Court ordered a return of the property seized by the Alien Property Custodian from a citizen of Germany, who, although a resident of Hawaii for 42 years, was caught in Germany at the outbreak of the war while visiting there with his family. While the court did not hold that it was reviewing the discretion of the Alien Property Custodian, it did say:

> "Certainly, the constitutional problem is not imaginary, and the claim not frivolous which would have to be rejected to decide in the government's favor. Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited * * *."

It is not the purpose of the Trading with the Enemy Act to seize properties of alleged enemy nationals to create a fund to pay war claims or make assets available to defray the expenses of war. The real purpose of the act is to prevent trading with the enemy and to stop such uses of foreign property rights existing in the United States, at the time of war, as might imperil our national defense. (*In Re Braier's Estate* (N. Y.), 111 N. E. 2nd 424.)

So that when the war comes to an end, and nations are at peace, the purpose of the Trading with the Enemy Act

ceases, and the taking of property years later amounts to confiscation. The attempted vesting by the Alien Property Custodian in this case is therefore too late. It accomplishes no purpose, within the meaning and intent of the Act, and, if given effect, would result in confiscation.

In *Guessefeldt* v. *McGrath*, 342 U. S. 308, 96 L. Ed. 342, the court concluded:

> "The concern of the Trading with the Enemy Act is with problems at once complicated and far reaching in their epercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislations strongly counsels against litera'ness of application. It favors a wise latitude of construction in enforcing its purposes." (Citing several cases.)

The Appellate Court of Indiana has followed that decision and has reached the same result as reached by this Court.

The power of the courts to review the acts of the Alien Property Custodian (or his successor, the Attorney General) should not be taken away and contention which urges this principle should be rejected.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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